

TAN CHONG PAY

a

v.

TAN SWEE BOON

HIGH COURT MALAYA, MELAKA

b

SURIYADI HALIM OMAR J

[ORIGINATING SUMMONS NO: 24-43-1997]

13 AUGUST 1997

FAMILY LAW: *Children - Custody - Infants of seven and four years old - Principles in granting custody - Welfare of child - Law Reform (Marriage and Divorce) Act 1976, s. 88(2) - Presumption in favour of mother - Law Reform (Marriage and Divorce) Act 1976, s. 88(3) - Separation of siblings - Law Reform (Marriage and Divorce) Act 1976, s. 88(4)*

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The applicant and the respondent were husband and wife with three children. Subsequently, they separated and it was mutually agreed between them that the applicant would have custody of the youngest child whereas the two older children would stay with their father, the respondent. Not satisfied with merely having one child under her, the applicant came before the court praying for custody of her other two older children as well, namely Marcus (who was above seven years old) and Nicholas (who was four years old).

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The issue before the court was whether custody of the two children should be given to the father or the mother. The court sought the assistance of the Welfare Department which presented a report on the applicant and respondent as regards their respective backgrounds, economic strength, the ambience of their homes, and the views of the children. The court also interviewed the children in chambers, in the absence of their parents, to hear their views on the matter.

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Held:

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[1] Although the law is silent as to whether the views of children should be extracted in the presence or absence of the parents, the better view is that the honest wishes of the children may be ascertained if the parents are not in their midst.

[2] It is imperative that before a custody order is made, the court must accede to the fundamental requirement that the paramount consideration is the welfare of the child. This legal expectation must not be speculative, promissory or even unfounded. It must be real, substantive, immediate and lasting. The benefits and advantages must be geared towards the direction of the child and not the father, mother, another sibling or for that matter the applicant. To exploit these personalities for the infant's welfare and

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- a* benefit must be the norm rather than the exception. Hence, the only reasonable approach is to gather and consider all viable factors that may assist the court in coming to a decision that will eventually result in the child developing well emotionally, mentally, socially and psychologically.
- b* [3] In deciding whether to hand over the two children to the mother or the father, the court was guided by the following factors: the conduct and attitude of the parties; the ages of the children; the views of the children; the ambience in the present house where the children are presently staying; the advantages of a natural mother over the father; the physical and spiritual needs of infants for their natural mother; the security and stability of the contending parties; the advantages and disadvantages of maintaining the *status quo*; the desirability of not separating the siblings; and the confidential report of the social welfare officer.
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- d* [4] In coming to its decision, at no period of time was the court regulated by any point system formulae as it would be absurd to determine matters of custody, which are closely linked with the emotional, mental, psychological or even physical growth and development of a child, by arithmetical calculations.

Cases referred to:

- e* Mahabir Prasad v. Mahabir Prasad [1982] 1 MLJ 189 (cit)
Lim Fang Keng v. Toh Kim Choo [1995] 4 CLJ 733 (cit)
Wong Phila Mae v. Show Harold [1991] 2 MLJ 147 (cit)
Re L (Infants) [1962] 3 All ER 1 (cit)
Re O (Infants) [1962] 2 All ER 10 (cit)
Amar Kaur a/p Ram Singh v. Najar Singh a/l Sagar Singh [1991] 1 CLJ 294 (cit)
- f* B Ravandran s/o Balan v. Maliga d/o Mani Pillai [1996] 2 MLJ 150 (cit)
Thavamani Deve a/p Govindasamy v. N Sugamaram a/l Neelmehan & Anor [1996] 1 AMR 1037 (cit)
Chong Siew Lee v. Lau Mun Chong [1995] 4 MLJ 559 (cit)
Re T (A Minor) [1993] 1 AMR 21 (cit)
- g* Lee Soh Choo v. Tan Ket Huat [1986] 2 CLJ 143 (refd)
Khoo Cheng Nee (P) v. Lubin Chiew Pau Sing [1996] 1 AMR 450 (cit)

Legislation referred to:

Law Reform (Marriage and Divorce) Act 1976, s. 88(2), (3), (4)

- h* For the applicant - Ong Beng Hian; M/s Allen, Gledhill & Ball
For the respondent - HY Lee; M/s Ling & Theng Book

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JUDGMENT

Suriyadi Halim Omar J:

The facts are quite straight forward in that the marriage could not prevent the parties from drifting apart resulting in them seeking out their own separate path and destiny. This predicament came about despite being blessed with three healthy children. The path of the wife led to the historical city of Melaka and in the process took with her the youngest of the siblings whilst the other two went to the father. It was not disputed that before these two children were with him, all three were with the mother, but subsequently taken away from her by the father. Mercifully for the court both parties without much argument agreed midway that the mother will have custody of the youngest. Not satisfied with merely having one under her watchful eyes, her maternal instinct and love for the other two have persuaded her to come before me to pray to have custody of them also.

Before I made the painful decision of handing over the two children to the mother or father or to tear the siblings apart which will invariably tear the heart of everyone, I sought the assistance of the Welfare Department to give me their views. In compliance with my request one Encik Mohd Emeran bin Abd Salam and one Puan Jama'eah bt. Abdul Ghani submitted to me their respective reports on the applicant and respondent as regard their backgrounds, economic strength, the ambience of their homes, the views of the children and their expert opinions.

These reports were classified as "sulit" and as a result none were submitted to the counsels for their perusal and comments. In brief the report of Encik Mohd. Emeran bin Abd Salam revealed that the applicant was quite comfortable with a salary of about RM2,240 per month working as a nurse at the hospital. In the event custody of the two children were given to her, she would send them to the relevant kindergarten and school without her normal schedules being disoriented. The relevant officer from the Welfare Department believed that her financial position though strong was still not strong enough to meet the needs of the extra mouths in the event the decision went her way, and hence the necessity of having to obtain RM3,000 per month maintenance for the children and RM1,000 for her own upkeep. It was the hope of the applicant that with the money obtained she could move out to another rented house or stay in her own apartment. Continuing to stay in the current house which is owned by her sister-in-law is another option open to her. The present house is a three bedroom terrace house, one of which is shared by the applicant with the youngest child. Comfort wise she is not having too much of it. Staying in a house that is owned by an in-law who has other young children surely too is not a plus factor. A factor that went

a the way of the applicant according to Encik Emeran were the ages of the children.

b The report of Puan Jama'eah bt Abdul Ghani portrayed the respondent as a person with a sound financial standing, in receipt of an income twice that of the applicant and living in a single storey semi-detached house. The children also appeared very comfortable and acted in the normal way when interviewed giving an impression of reasonable satisfaction. According to her report the two children preferred to stay with the father. This view of the children I believe was not unexpected, bearing in mind that they had been staying with him for some time, compounded by the fact that that significant question was posed to the children in the father's house. I must stress that these two reports eventhough clinically prepared, were of no consolation to me before making my decision, as not only did the reports not indicate their firm opinions but extracted a relevant view of the middle child which was in total variance to that given in my chambers. The parents or lawyers were not invited to witness the interview and I merely had two lady interpreters to assist me namely Puan Jasvender Kaur and Puan Mary Chiew.

e Apart from complying with the statutory requirement of hearing the views of the children, interviewing the children in my chambers was necessary, as the matter was contested tooth and nail by the parents. Eventhough the law is silent as to whether their views must be extracted in the presence or non-presence of the parents, the better view is that the honest wishes of the children may be assured if the parents were not in their midst. Without having to lay down the details, I did the needful to ensure that my exercise bore fruits. Having observed patiently that they were not in the least intimidated by being in my chambers I then proceeded with my quest assisted by the two lady interpreters. After interviewing them I concluded that:

- f* 1. Marcus Tan Jian Ming is a highly intelligent boy who is already aware of the matter at hand;
- g* 2. he definitely wanted to stay with his father and immensely attached to his father;
3. he loved his mother but preferred his father over his mother;
- h* 4. his health was reasonably good and his mental progress was normal; and
5. to take him away from his father would certainly result in some dramatic and negative change in his emotional development and growth as well as his educational progress. (see *Mahabir Prasad v. Mahabir*

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Prasad [1982] 1 MLJ 189 of the negative effects of tearing a child away from a stable and secure surrounding). *a*

As regards Nicholas Tan Jian Wei I found that:

1. he was oblivious as to what was happening around him; *b*
2. he was acting like any normal four year old child who believed that whenever the mother was not around it was because she had gone to work. This belief must have been strengthened by the consistent and constant visits of the mother thus giving an impression of normality whenever she was not around; *c*
3. initially despite being probed two or three times his answers were consistent in that he wanted to be with his brothers and parents. His answers impressed upon me that he was totally unaware of the separation. Later he unreservedly said that he wanted to stay with his mother and not his father; *d*
4. that this child was too young to be given the right of choice and therefore the task must be exercised by me solely;
5. that the custody of this child must be given to the mother despite the fact that he had been with his father for some time; and *e*
6. that the needs of this child and his eldest brother were different. I must add that Nicholas will not be lonely as the presence of the youngest brother and the overwhelming love that will flow from the mother will certainly fill the vacuum. *f*

Those were the salient facts which I had before me and on which I had to rely on before any decision was made.

Under the Law Reform (Marriage and Divorce) Act 1976 (Act 164) the court has power to make an order for custody and may at any time place a child in the custody of his or her father or his or her mother or where there are exceptional circumstances the child may be entrusted to some other relative. In fact courts have a wide power with regard to custody but subject to the pre-requisites of the above statute. Section 88(2) reads as follows: *g*

In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard: *h*

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- a* (a) to the wishes of the parents of the child; and
- (b) to the wishes of the child, where he or she is of an age to express an independent opinion.

b At a glance it is imperative that before a custody order is made the court must accede to the fundamental requirement that the paramount consideration is the welfare of the child. When the law enunciates that legal expectation, it must follow that that expectation must not be speculative, promisory, or even unfounded. It must be real, substantive, immediate and certainly lasting. Since the law speaks of the welfare of the child, then the benefits and advantages must be geared towards his direction and not the father, mother, another sibling or for that matter the applicant. To exploit these personalities for the infant's welfare and benefit must be the norm rather than the exception. Anything that flows from the infant must be construed as coincidental and God's gift to the recipient. To be anywhere close to the optimum as envisaged by the law, which is a tall order, the only reasonable approach is to gather and consider all viable factors that may assist the court in coming to a decision that will eventually result in the child developing well emotionally, mentally, socially and psychologically (see *Lim Fang Keng v. Toh Kim Choo* [1995] 4 MLJ 654; *Wong Phila Mae v. Show Harold* [1991] 2 MLJ 147; *Re L (Infants)* [1962] 3 All ER 1; *Re O (Infants)* [1962] 2 All ER 10). For easy reference I have gathered the following factors, with the necessary illustrations and explanations, and have split them under the headings of:

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- f* 1. **the conduct and attitude of the parties.** The quality of this consideration takes a more significant role especially when the parents are unimpeachable in every respect (see *Re O. (Infants) (supra)*). Eventhough I detected no flaw in either of them as regard their conduct and attitude to the children I also had to consider their separate ability to cater to the needs of the children (*Amar Kaur a/p Ram Singh v. Najar Singh a/l Sagar Singh* [1991] 1 CLJ 294). Furthermore, however desirous the parties are of wanting the children, that desire must be subordinate to the consideration of the welfare of the children which is the overriding consideration (*B Ravandran s/o Balan v. Maliga d/o Mani Pillai* [1996] 2 MLJ 150);
 - g* 2. **the ages of the children.** Marcus Tan Jian Ming in this case is above seven years, born on 27 April 1990, whilst Nicholas Tan Jian Wei is about four years old. There is an additional statutory advantage for a mother as regards a child that is below seven years by virtue of the presumptive provision of s. 88(3), at best an advantage but never decisive (see *Thavamani Deve a/p Govindasamy v. N Sugamaram a/l Neelmehan & Anor* [1996] 1 AMR 1037 and *Chong Siew Lee v. Lau Mun Chong* [1995] 4 MLJ 559);
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3. **the views of the children.** Under s. 88(2) of Act 164 the court must have regard to the wishes of a child where he or she is of an age to express an independent opinion. Marcus had clearly indicated that he desired to be with his father whilst Nicholas indicated his desire to be with his mother. As to whether the court should positively view the wishes of the child is a question of fact after undergoing a process of communication or interaction by which a fair opinion may be formulated. To date it has been the practice of courts to invite the child to the judge's chambers and be interviewed so as to ensure that that child is taken away from the intimidatory presence of the public or legal processes. As regards this case after observing Nicholas as regards his answers, behaviour, demeanour and his understanding of the proceedings his reaction combined with the totality of my observation convinced me of his incapacity to express an independent let alone a viable opinion. Fortunately the court's order to hand him over to his mother coincided with his desire to be with his mother;
4. **the ambience in the present house where the children are presently staying.** Currently the children are quite comfortable with the available space and salubrious surroundings in the father's house *vis-a-vis* the applicant's place of residence. In the applicant's house, space and comfort are two highly sought after commodities, and the additional presence of the two children will not be conducive to their growth and welfare. With the two creating a crescendo with the sister-in-law's screaming children in that small house, the good relationship between her and the sister-in-law may be put to the test, again to the detriment of the children;
5. **the advantages of a natural mother over the father.** Under s. 88(3) of the same Act, no doubt due to natural phenomena, it is a rebuttable presumption that for the good of a child below the age of seven years the latter should be with his or her mother. On the other hand in deciding whether that presumption applies to the facts of any particular case the court shall have regard to the undesirability of disturbing the life of a child by changes of custody. For purposes of our case this provision is inapplicable as Marcus Tan Jian Ming is above seven years of age, having been born on 27 April 1990. On the other hand even if Marcus were to be below the age of seven and the rebuttable presumption applies, bearing in mind his wishes not to be separated with his father, together with the undesirability of disturbing his life by changes of custody would have been more than sufficient to rebut the above presumption (see *Re T (A Minor)* [1993] 1 AMR 21). On the other hand the applicant may invoke this provision to assist her

- a* case as regards Nicholas Tan Jian Wei as he was born on 17 Mac 1993;
- b* 6. **the physical and spiritual needs of infants for their natural mother.** Under this heading Nicholas is still in dire need of that physical and spiritual assistance that will flow from his mother. As for Marcus not that he can do without this factor but his needs are totally different to that of his younger brother;
- c* 7. **the security and stability of the contending parties.** In terms of income the respondent wins hands down but this factor has not distorted my perception and prevent me from giving the custody of Nicholas to the mother by virtue of the other considerations;
- d* 8. **the advantages and disadvantages of maintaining *status quo*.** Indeed it is undeniable that any uprooting of a child from the matrimonial home and the environment that he or she has been familiar with and have adapted to since young will invariably affect his or her daily routine and perception to life (see *Lee Soh Choo v. Tan Ket Huat* [1986] 2 CLJ 143). To drag away that child not only is heart wrenching to the parents but also to the innocent and ill-equipped infant. Eventhough in the current case I have ordered that Marcus
- e* remain with the father, it is totally unfounded to allege that his mother's love and attention cannot be substituted. His father not only is attentive but loving and the tenuous nexus between Marcus and his mother cannot be said to be in danger as she is constantly making visits to the respondent's house. Looking through the respondent's
- f* point of view, without being labelled a sexist, as much as a child is deprived of a mother's love and care when the custody of the child is handed to the father, similarly a child will suffer the loss of the protection and good qualities of the father were that child to live with the mother. With such sound arguments put forth by any father or
- g* mother no correct decision can be arrived at unless all the evidence has been sieved and considered with a fine toothcomb. In the above case of *Lee Soh Choo (supra)* Siti Normah Yaakob J (as she then was) eventhough fully aware of the value of a mother's love and attention especially when the children were still of tender years, on the facts
- h* of that case, held that the welfare and interest of the children would be best served if they remained at the matrimonial home with their father.
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9. **the desirability of not separating the siblings.** It cannot be denied that the task of the judge becomes more unenviable when there are two or more children of a marriage as, apart from the statutory requirements, the legal enunciations of eminent judges and jurists cannot be discarded and must be viewed with great respect. The wealth of guidelines from previous cases have always been that when there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each child independently. As much as under s. 88(4) of the Act confirms that inclination, the constant factor has been that children, where possible, should not be separated (see *Khoo Cheng Nee (p) v. Lubin Chiew Pau Sing* [1996] 1 AMR 450. On the other hand if justification exists, a justification which is not speculative but real and positive, a court should not hesitate to separate the siblings.

Guided by the above legal principles in the light of Nicholas' age, absolute lack of maturity and complete obliviousness of the proceedings I eventually took the painful step of taking Nicholas away from the matrimonial home and effectively separating the siblings; and

10. **the confidential report of the Social Welfare Officer.** The reports of the Welfare Department were valuable sources of information and assisted me in coming to a fair and speedy decision.

To conclude, the above ten major guidelines assisted me in a large way before making the order that Marcus remain with the father whilst the custody over Nicholas be granted to the applicant. At no period of time was the court regulated by any point system formulae as it is absurd to determine matters of custody which are closely linked with the emotional, mental, psychological or even physical growth and development of a child to be decided by arithmetical calculations.

Reported by Ling Hea Hoon